not in accordance with rule 12(2) of the Election Petition Rules, 1954 as the petition herein contains more than three charges." Unfortunately he has not taken the opportunity to amend the word "three". The sum of $750 must clearly cover four charges. If the amount of $750 is not in accordance with rule 12(2) it must necessarily mean that there are more than four charges. Either amendment is made or better still the power to strike out is used; otherwise the words "as the petition herein contains more than three charges" become absurd and irrelevant. The court has an inherent right to take an affidavit off the file for prolixity (*Walker* v. *Poole* [37] and *Hill* v. *Hart-Davies* [38]). It also has power to order any matter which is scandalous and irrelevant to be struck off from any affidavit (*Re Jessopp* [39]). For the purpose of determining the real issue between the parties I would strike out those words. No costs are to be allowed in respect of those affidavits.

Time has been prescribed by rule 12(1) for payment of security to cover all costs, charges, and expenses. It is therefore doubtful if the court has power to order additional security to be paid as this would in effect be extending the prescribed time for payment of security. Rule 12(2) serves as a guide as to the amount of security to be paid. The difficulty is the meaning of the word "charge". Various meanings are given in any good dictionary for this word. But what is the true meaning of the word as used in this rule? The object and intention of rule 12(2) is clear. To equate the word "charge" with the word "ground" would produce an apparent contradiction of the purpose of the rule. The word must be construed as to give a sensible meaning to the rule. The sense of the word must be such as to harmonise with the context and promote in the fullest manner the object and intention of the legislature. I think the word "charge as used means an accusation of the commission of a corrupt practice or an illegal practice at an election or an accusation of the infringement of any provision of the election law at an election. The charge may be general or specific. It is sufficient for me to say that the security in petition No. 1 and petition No. 4 are insufficient without specifying the exact number of charges. If no security is paid or the security is insufficient then it is my view that "security as in this rule provided is not given." The result is that no further proceedings shall be had on the petition and the respondent may apply for an order directing dismissal of the petition. In my judgment the respondents also succeed on the motion on this ground. The result is that the three petitions are dismissed with separate costs to respondents to be taxed on the higher scale. Moneys deposited by way of security may be applied in the payment of taxed costs. Costs to be taxed as between solicitor and client. Certificate for two counsel.

Motions dismissed.

SUCCESS ENTERPRISES LTD. v. ENG AH BOON

[O.C.J. (Winslow J.) October 3, 1967]
[Singapore — Suit No. 561 of 1966]

Landlord and Tenant — Controlled premises — Structural alterations carried out to the premises — Whether "premises" are "new" buildings when looked at as a whole — Control of Rent Ordinance (Cap. 242), s. 2.

Precedent — Whether High Court in Singapore bound by decision of Federal Court of Malaysia after separation.

There were three structures on the land occupied by the defendant when he went into occupation prior to 1947. There now remained only two structures (known as No. 44 Aroozoo Avenue, Singapore) the third having been demolished in 1961. In the present action the sole question was whether the remaining structures were built or completed after September 7, 1947. It was in evidence that the original main hut measuring 13' x 44' 6" was a dilapidated old plank and attap hut which was demolished in 1961 and a fresh structure 25' x 36' was erected in its place which incorporated new brick walls with some plank and reinforced concrete netting. It was also in evidence that the shed at the back which was 16' x 19' had been altered to 21' 8" x 16' 3½". The cost of all these operations was $3,000. On the question whether the premises No. 44 Aroozoo Avenue were controlled premises,

Held: there was ample evidence to justify the conclusion that the two old dilapidated huts have as a result of these substantial alterations made to them become, looked at as a whole, a new building in fact and therefore were not subject to the Control of Rent Ordinance.

Per Curiam: "If the burden of proof lies with the landlord (to show that the premises are not controlled premises) then the course followed by the plaintiff in this case in adducing evidence first was the correct one. If, however, the burden is on the tenant to prove that the premises are controlled, he could not have been prejudiced in any way because he would have had the advantage of hearing the landlord's case first and the landlord cannot complain that he has been prejudiced because he volunteered to give evidence first and literally asked for it."

Observations on whether the High Court in Singapore was bound by a decision of the Federal Court in Malaysia decided after the separation of Singapore from Malaysia.

Cases referred to:—

(1) *Syed Ahmed Al-Junied & Ors.* v. *Reshty* [1966] 2 M.L.J. 124, F.C.

(2) *Dadhi Ral Yado* v. *Mukat Rai* [1958] M.L.J. 193.

(3) *Mohamed bin Myddin* v. *Teo Mek Yok* [1966] 2 M.L.J. 285, F.C.

(4) *Eastern Realty Co. Ltd.* v. *Chan Hua Seng* [1967] 2 M.L.J. 195.

(5) *Kai Nam* v. *Ma Kam Chan* [1956] A.C. 358.

(6) *The Queen* v. *Cheltenham & District Rent Tribunal* Estate Gazette, October 19, 1957.

(7) *Shanon* v. *McMahon* [1945] I.R. 332.

CIVIL SUIT.

K. C. Chan for the plaintiffs.

R. Yap for the defendant.

Cur. Adv. Vult.

Winslow J.: The issue which I have to decide in this action is whether the premises known as No. 44, Aroozoo Avenue are protected under the provisions of the Control of Rent Ordinance (Cap. 242), (hereinafter referred to as "the Ordinance").

Whereas the plaintiffs, Success Enterprises Ltd., claim that the said premises were built or were completed on or after the 7th day of September, 1947 the defendant, who is their tenant, denies this and claims that the premises were in fact built or completed before that date and that he is therefore entitled to the protection conferred by the Ordinance. Before embarking upon a consideration of the evidence adduced on both sides and the law applicable thereto, it may be desirable to consider the definition of "premises" contained in section 2 of the Ordinance. That definition reads as follows:—

> '"Premises" means any dwelling house, flat, factory, warehouse, office, counting house, shop, school and any other building whether of permanent or temporary construction in which persons are employed or work and any part of any such building let or sublet separately and includes any land whereon any such building is or has been erected with the consent of the landlord but does not include any new building built or completed after the 7th day of September, 1947.'

It will be observed that this definition excludes any new building built or completed after 7th September, 1947.

In the present case there were originally three structures on the land occupied by the defendant when he went into occupation prior to 1947. There now remain only two structures, the third having been demolished in 1961 and the question which I have to determine is whether one or the other or both of the two remaining structures is a building built or completed before 7th September, 1947, it being contended on behalf of the defendant, on the authority of *Syed Ahmed Al-Junied & Ors.* v. *Reshty* [1] that even if one of these structures is a building built or completed before 7th September, 1947 then the premises in question will fall within the protection of the Ordinance.

It may be useful at this stage to dispose of a question which was raised at the end of the case as to whether the burden of proof in these cases lies on the landlord or the tenant. Wee Chong Jin J., as he then was, held in *Dadhi Ral Yado* v. *Mukat Rai* [2] at page 195 that "it is for the landlord to establish that the case falls within the second part of the definition", i.e., that the buildings in dispute were built or completed after 7th September, 1947.

Counsel for the plaintiffs submitted that this decision had been overruled by the Federal Court of Malaysia, sitting in Kota Bahru, in *Mohamed bin Myddin* v. *Teo Mek Yok* [3] where the Federal Court held that the onus is on the tenant to prove that he is within the protection of the Ordinance. Counsel further submitted that if the decision of the Federal Court of Malaysia sitting in Kota Bahru in 1966 is not considered to be binding on the High Court in Singapore, I should nevertheless refrain from following the decision in the *Dadhi Ral Yado* case to which I have earlier referred.

Be that as it may, the fact remains that counsel for the plaintiffs commenced calling evidence to prove his case without any reference to the Federal Court decision. If he is right in his contention that the onus is on the tenant one would have thought that he would have drawn the court's attention to the Federal Court decision at the very commencement of the trial and insisted on the tenant's discharging that burden first. However, he conceded, in his final address, that the plaintiff was bound by his election to give evidence first and that since all the evidence was already before the court the case could be decided on "a preponderance of evidence regardless of whoever has the burden of proof". If the burden of proof lies with the landlord then the course followed by the plaintiff in this case in adducing evidence first was the correct one. If, however, the burden is on the tenant to prove that the premises are controlled, he could not have been prejudiced in any way because he would have had the advantage of hearing the landlord's case first and the landlord cannot complain that he has been prejudiced because he volunteered to give evidence first and literally asked for it.

The more important question that arises in this case is whether the two structures have undergone such substantial structural and/or other alterations as to have become new buildings. This, as Wee Chong Jin C.J. held in *Eastern Realty Co. Ltd.* v. *Chan Hua Seng,* [4] is "always a question of degree depending on the facts of each particular case. No test of universal application can in my view be laid down." Numerous other cases, notably English, Irish and Malaysian, were also cited in this connection to some of which I shall refer later.

I now propose to deal with the facts on which I make the following findings:—

(a) the defendant is the tenant of No. 44 Aroozoo Avenue and has been so since 1952. He and his family had moved into the premises in 1946 when his uncle, Chia Chin Lin, who died in 1964 was ground tenant. At that time the premises bore a different number, to wit, 144-19 Aroozoo Avenue. The uncle had apparently bought the structures and sheds on the land on which he was ground tenant from Khoo Chuan Hee for $130 in 1946. Khoo Chuan Hee gave evidence to the effect that he first saw three

structures on the land in 1943. The defendant and his witnesses were agreed that there were three huts on the land until 1961 of which the middle one was the largest and was used as a dwelling house. This hut will be referred to as "the main hut". The hut at the back of the main hut was occupied by the uncle on his return from smoking opium. This hut will be referred to as "the back hut". The third hut, which no longer exists, was never used as a dwelling house and with this I am not further concerned;

(b) in 1961 an application was made by the defendant to the Chief Building Surveyor for reconstruction or renovation of the main hut. There was some dispute between the parties as to whether this application was one for reconstruction or repairs. The witnesses from the Chief Building Surveyor's Department took the view that the application was one for reconstruction for reasons given by them which I accept. The important question to be decided does not turn so much on whether the application was for reconstruction or for repairs as on whether whatever changes took place had effected a change of identity of the main hut so as to constitute it a new building. No application was made for repairs or alterations to the back hut but it is not disputed that both these huts were dilapidated old plank huts with attap roofs. In fact the first Assistant Building Inspector found the main hut to be an old plank attap house in very bad condition. This was as a result of his inspection of the site on 7th September, 1961. It should be noted that this witness, Teo Tian Teng (P.W.2), saw no toilet in that hut on that date;

(c) on 17th January, 1962 after the Chief Building Surveyor's file, Ex. P1, on the subject had been sent to the Property Tax Department, Lim Seow Hiong (P.W.3) inspected the premises and subsequently the annual value which had previously been assessed at $48 was revised to $204. This witness tendered his file, Ex. P2, in evidence which, on the *pro forma*, shows the results of his inspection and the reasons for his valuation not only of the main hut but also the back hut to which he refers as "an open-sided sned". According to this witness he saw both the main hut and the back hut. Although this witness was chiefly concerned with the main hut which he found to be in good condition, he did not record the condition of the open-sided shed as he claimed that the department would not pay attention to subsidiary structures unless they are reconstructed. He was, however, positive that he did in fact see this shed and gave its measurements as 16′ x 9′. According to him the back hut or open-sided shed as he called it had four posts and a corrugated iron roof but he agreed that it might have had more than four pillars. What he was sure about is that at least one of the side walls was missing. It is difficult to believe that this witness would have proceeded to assess the annual value of the back hut on the basis of its measurements' being 16′ x 9′ if in fact it then had its present dimensions which are considerably greater. It should also be noted that he saw that this shed was a little distance behind the main hut as shewn in his plan. He also gave the dimensions of the main hut as being 25′ x 36′. This is again considerably different both as to dimensions and arrangement of rooms and kitchen from what the plaintiff's architect, Ho Kok Hoe (P.W.5) saw on 16th May, 1967 the day before he gave evidence. A comparison of Plan C (made by the Valuation Assistant (P.W.3)) with Plan D (made by Ho) clearly shows the changes which have undoubtedly taken place between 1962 and 1967. It should also be noted that whereas none of the officers from the Building Surveyor's Department noticed any toilet or bath in the main hut, the architect. Ho, found a bathroom adjoining the kitchen in 1967;

(d) Poon Ah Sam (P.W.4), an Assistant Building Inspector who was originally in charge of the area in which the premises are, and had been on leave when Teo Tian Teng (P.W.2) first inspected the premises, made his own inspection on 17th October, 1961 when he found that the main building was still in its original condition, i.e., a dilapidated plank and attap hut. On his second visit which was before 30th December, 1961, which was the date on which his file, Ex. P1, was sent to the Property Tax Department, he found that the work had been completed and that it had been done according to their approved plan — enclosure (2) in Ex. P1 — which is also shown on Ex. P3 prepared by the architect, Ho, as Plan B;

(e) Ex. P3, prepared by the architect, Ho, also contains a Plan A on the extreme right of that exhibit which shows the dimensions of the main hut and its subdivisions into rooms as they were when they were first inspected on 7th September, 1961 by (P.W.2). This was the old dilapidated plank hut with attap roof and its dimensions then were 13′ x 44′ 6″. Between 17th September, 1961 therefore and 17th January, 1962, if not before 30th December, 1961, the old main hut had been converted into the form shown in Plans B and C. The plank and attap roof hut had become a partially brick and plank construction with a corrugated iron roof with a freshly cemented floor. As the architect, Ho, said, the hut in Plan A would have to be demolished to make way for the building in Plan B. There is now a brick wall 3′ 9″ high all round the main hut from the floor to the under side of the window-sill and from the window-sill to the ceiling the walls consist of plank and British reinforced concrete netting. The back hut has at least seven sides of the dimensions shown on Plan D in Ex. P3 showing that it is at least 21′ 8″ long where it adjoins the main hut and is 16′ 3½″ broad whereas its original dimensions were 16′ x 9′. Moreover, instead of being a separate hut some little distance behind the main hut, it now has a common wall with and adjoins the main hut;

(f) the back hut is now to all intents and purposes an adjunct to the main hut and the two huts together comprise one entity. Anyone looking at the premises from the outside (as can be seen from the photograph Ex. D1C) could reasonably conclude that the two together now form one dwelling house. I had an opportunity of visiting the premises with counsel during the trial and arrived at this self-same conclusion notwithstanding the fact that there is no direct access into the back portion through any opening in the common wall between the two portions. In order to enter the back portion one has to get out through a side door leading out of the kitchen, walk a few feet along that side to reach another little door leading into the back portion. From the kitchen one can look through the reinforced concrete netting into the back portion and *vice versa*. The evidence is that the cement floor of both portions and the corrugated zinc or iron roofs of both portions follow the same pattern. The architect, Ho, confirmed this. He found the cement floor of both portions to be in the same condition and so were the roofs of both. It also appears from his evidence that the materials used in the back portion are older than those used in the front and this is confirmed by evidence called for the defence from which it is clear that timbers from the old main hut which was demolished were used when the back hut was repaired. As Yap Hua Siang (D.W.4), a construction worker, who was responsible for the alterations to both huts said, "old timbers of the

main hut were used to replace the rotten timbers of the rear hut". By "timber" he meant the wall planks and he said that over 100 planks were so used;

(g) this construction worker also stated that before he commenced work on the two huts, the main hut and the back hut were about 10' apart but that during the repairs, the two huts were brought together and were only about 2' apart. That may well have been so at the end of 1961 or the beginning of 1962 but it is quite clear from the architect, Ho's, plan made after his visit on 16th May, 1967 that the two portions are no longer 2' apart. In fact they share a common wall;

(h) I have considered the evidence called for the defence with some care and find little in it to support the contention that, whatever alterations were made to the two huts, these have not effected any change in their identity as the structures which were in existence prior to 1961. It should be remembered that the three original huts were purchased in 1946 for $130 from Khoo Chuan Hee (D.W.2). There is some slight difference as to the actual date of the purchase. The defendant claims that they were purchased pre-war by his uncle whereas Khoo Chuan Hee himself says that the sale took place in 1946. Whatever the actual date was the fact remains that the defendant claimed that in 1961 he spent $3,000 for the labour and materials required to effect the alterations made. This is of some importance when I come to consider the law relating to whether the alterations are of such a degree as to have effected a change of identity. It certainly seems an extraordinarily large sum to spend on repairs when the the total cost of the original structures was $130 in 1946. As the defendant himself said he had to buy new bricks and everything he bought was new although some of the old materials were still used;

(i) the defendant, Eng Ah Boon (D.W.1), gave unsatisfactory evidence. He contradicted himself several times. He claimed that only repairs were effected to the main hut and was vague, if not contradictory, about repairs done to the back hut. He claimed that the back hut had originally had three plank walls and one wall of canvas and that now the canvas wall was a plank wall. He claimed that meranti timber was used for the original plank walls. In cross-examination, when confronted with the fact that the architect, Ho, had found that the walls of the back portion were constructed of a jumble of assorted old timbers, he said that he was told by workmen that the timber was meranti and that he himself did not know the type of timber used for the walls. After further cross-examination he said that the workers did not tell him that the walls were made of meranti timber. He said that they were talking at random and then he came out with the amazing statement that they were talking about somebody else's house. He claimed that in 1962 the back portion was not detached from the front and then said that before 1962 the back and the front had a common plank wall. Later, he said that before the repairs the back portion was detached from the front. Again in relation to the space between the two huts he had first claimed that there was a plank floor between the two huts before the repairs which was 5' wide. Later he stated that there was no plank floor between the buildings before the repairs. Later he admitted that there was only earth between the two structures 5' wide. Later he stated that when the Valuation Assistant (P.W.3) inspected the premises on 17th January, 1962 there was no plank floor between the two structures. Further, later in his cross-examination, he changed his original version that the back portion had three plank walls and one of canvas by saying that the back portion had five walls. He then drew a sketch plan, Ex. D2, of the back portion, as it originally was, in which he has shown seven walls. On the whole I find it difficult to believe this witness at all on any disputed issue;

(j) his next witness, Khoo Chuan Hee (D.W.2) was the man who sold the huts in 1946 to the defendant's uncle. He drew a plan, Ex. D3, showing the two huts from which it is clear that there was a space between the two huts. He also shows the back hut as having had four sides. He later drew another plan, Ex. D4, in which he shows that the back hut had five sides. Later he gave the distance between the two huts as being about 10'. It is difficult to attach much weight to the evidence of this witness as to the dimensions of the back hut in 1961 because he never entered the hut. He only saw it as he walked past. He, however, claimed that although he never stepped inside the back hut he could see the inside through the tarpaulin from the outside as he walked past. All that this witness was trying to say was to support the defendant in claiming that no repairs had been done to the back hut and that it was always about the same size. Finally, in answer to questions by the court, he said he never walked round the back hut. He could only be sure of the tarpaulin side and one other side which he saw from the outside. But he still maintained that he could see the inside and see the other sides. This witness was obviously trying to be helpful to the defendant but I do not consider that he was in a position to see all that he claimed that he saw on his walking past the outside of the hut;

(k) the next witness, Tan Hak Cheng (D.W.3), a taxi driver, claimed that the back portion had not changed in shape or dimensions since 1946. He also drew a plan, Ex. D5, showing the back hut as having had five sides. He gave the measurements of the back hut in 1962 as 17' x 14'. All he could say was that in 1946 the shape of the back hut was similar to that shown in Plan D of Ex. P3. I formed the impression at the time this witness was giving evidence that he knew very little about dimensions or shapes but that he was prepared to say anything of a general nature so long as it helped the defendant's case. The most I can say about his evidence is that it does not help to carry the defendant's case any further;

(l) I now come to the evidence of the last defence witness, the man who effected the alterations in 1961, Yap Hua Siang (D.W.4). This man claimed that he not only effected alterations to the main hut but that later he repaired the back hut. In this he clearly contradicted the defendant who was vague about the repairs effected to the back hut. I have already dealt partially with the evidence of this witness earlier from which it is quite clear that old timbers from the main hut were used to replace the old wall planks of the back hut. He also touched up the old cement floor of the back hut. He drew a plan of the back hut, Ex. D6, which he corrected in red ink to show five sides. Later on, on being shown Plan D of Ex. P3 he claimed that the back hut was more like that shown in this plan;

(m) it follows from the above analysis of the evidence and my findings on the facts that I prefer the plaintiff's version to that of the defendant and that if the burden of proving his case lies on the plaintiff, then he has discharged that burden. If, however, the burden lies on the tenant by virtue of the Federal Court decision to which I have earlier referred and by which it is said that I am bound, then the defendant has woefully failed to discharge that burden.

It now remains for me to deal as briefly as I can with the reasons why I consider that the defendant has failed to discharge the burden of showing that there has been no change of identity so far as the two huts in question are concerned. As I have earlier stated, the question whether the two structures have undergone such substantial structural and/or other alterations as to have become new buildings is always a question of degree depending on the facts of the particular case. It should also be borne in mind that on the authority of *Kai Nam (a firm)* v. *Ma Kam Chan,*[5] a Privy Council decision, the word "new" in our definition of "premises" in section 2 of the Ordinance is used in relation to the building and not to the materials of which it is composed. In the present case the original main hut, whose dimensions were 13′ x 44′ 6″, was a dilapidated old plank and attap hut in very bad condition which was demolished in 1961 and a fresh structure (25′ x 36′) was erected in its place which incorporated new brick walls all round together with some plank and reinforced concrete netting. The arrangement of the rooms and the kitchen therein bears no resemblance to what it had been before. On 17th January, 1962 when inspected by the Valuation Assistant (P.W.3), it was therefore a broader and slightly shorter building. Behind this structure P.W.3 saw a shed which was 16′ x 9′. The architect, Ho, on 16th May, 1967 found that the dimensions of this fresh structure had been altered further to 25′ 5″ x 43′ 7″. It would seem that between 1962 and 1967 further alterations had been carried out by someone and the shed at the back which was 16′ x 9′ has now assumed its present proportions of 21′ 8″ x 16′ 3½″ to say nothing of the plank floor over the drain behind the common wall between the two structures. Furthermore, a bath-room seems to have been added on some time after 1962 next to the kitchen. The cost of all these operations was $3,000 and it is difficult to hold that the old dilapidated huts costing $130 in 1946 retain their old identity in view of the expenditure of such a very large sum on the alterations made. I appreciate that the cost of labour and materials must have gone up considerably since 1946 but certainly not to this extraordinary extent. As Lord Goddard said in *The Queen* v. *Cheltenham and District Rent Tribunal* [6]:—

> "The applicant appeared to be a man who expected a lot for his 14s. a week. It seemed that at some time in the 1920's the cottage had been let at 5s. a week. There was no doubt a building on that site had been let at that rent. But since then a great deal of money had been spent on the property. It had been modernised, new doorways created and part of an old adjoining cottage had been incorporated with it.
>
> Five shillings a week was paid for some tumbledown old cottage which has now been modernised and enlarged. It is quite a different property now."

There is considerable similarity between the facts of the present case and what occurred in the case just cited. An old tumbledown plank and attap hut has been demolished and a fresh structure erected in its place with brick walls and reinforced concrete netting which has been extended to incorporate with it another tumbledown hut, which had at least one open side, whose dimensions have also been altered and enlarged. To all intents and purposes, the two old huts now comprise one new building. The two taken together certainly bear no resemblance to their ancestors and it is quite a different property now.

Counsel for the defendant realised that in respect of the main hut the evidence were overwhelmingly against his succeeding in establishing that its replacement by the present main building effected no change of identity and, accordingly, spent considerable time in trying to convince the court that there had been no substantial alterations to the old back hut. He contended that if the old back hut had all along been more or less what it is now in shape and dimensions, then he must necessarily succeed in obtaining the protection of the Ordinance for both structures.

It seems to me to be an abuse of language to regard what has taken place since 1961 as effecting no change of identity so far as these two structures are concerned. Even assuming that the back hut now has the shape and dimensions which it originally had, which submission I have rejected, in my opinion it would be idle to pretend that it retains its original identity as a separate tumbledown hut used by an old man for sleeping off the effects of opium. It is now very much part of the main building. It is in the closest possible, juxtaposition to the main building and, *inter alia,* houses guests and provides space for a car to be kept therein. I have also found that its shape and dimensions have been altered. In these circumstances it is difficult to hold that it has not shed all the attributes of the old back hut which stood alone and remote from the main building. As Black J. said in *Shanon* v. *McMahon* [7]:—

> "The new work must have been not merely substantial, but so substantial as to have transformed the house, looked at as a whole, into 'a new house in fact. I think these words must connote, not mere accessorial additions or alterations of merely localised effect, but something fundamental, transforming the general structural character of the house as an entire entity."

I find that there is ample evidence to justify the conclusion that the two old dilapidated huts have as a result of these substantial alterations made to them become, looked at as a whole, a new building in fact. Alternatively, they are, at least, two new buildings.

Judgment will therefore be entered for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors: *Braddell Bros.; Battenberg & Talma.*

SOO SENG HUAT v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) October 4, 1967]

[Penang — Criminal Appeal No. 40 of 1967]

Gaming — Character lotteries — Common Gaming Houses Ordinance, 1953, s. 4(1)(c) — Possession of a record of stakes — Presumption under s. 11 — Onus.

Once possession is proved then the presumption under section 11 of the Common Gaming Houses Ordinance, 1953 passes the burden on the defendant to rebut the presumption on a balance of probabilities that that particular record refers to no lottery at all or to a lottery not then in progress. If he does so, he is entitled to an acquittal. If he does not do so or if he cannot do so he must be convicted.

Case referred to:—

(1) *Public Prosecutor* v. *Neoh Boon Cheong* [1960] M.L.J. 31.

MAGISTRATE'S CRIMINAL APPEAL.

Haji Suhaimi bin Dato' Haji Kamaruddin (Deputy Public Prosecutor) for the appellant.

Geh Cheng Lock for the respondent.

Chang Min Tat J. (delivering oral judgment): The respondent in this appeal was on the 23rd of April, 1967 found in possession of a record of stakes in character lotteries bearing the date April 4, 1967. Arising from that possession the respondent was charged in the magistrate's court with the offence of assisting in carrying on a public lottery, punishable under section 4(1)(c) of the Common Gaming Houses Ordinance. At the conclusion of the case for the prosecution and on the submission of the counsel for the respondent, the respondent was acquitted and discharged without his defence being called. Against that acquittal and discharge the public prosecutor now appeals.

The respondent in the court below relied upon the existence of the date April 23, 1967 on the record of stakes as casting some doubt upon any allegation that the record relates to a lottery then in progress. That reliance is clearly seen in the record of the learned trial magistrate and that submission would appear to weigh very considerably in his mind when he came to write his grounds of judgment. With every respect to everybody concerned that submission runs counter to the decision of the Court of Appeal in the case of *Public Prosecutor* v. *Neoh Boon Cheong*,[1] a decision which is not only binding on me but with which I respectfully agree. Possession having been proved against the respondent, a presumption is raised against him and until the contrary is proved, he is presumed to be assisting in a public lottery then in progress.

I do not think it is necessary or possible for me to add anything more to the interpretation of section 11 in the case cited and all that remains for me to say is that once possession is proved, then the presumption under section 11 passes the burden on the defendant to rebut the presumption on a balance of probabilities that that particular record refers to no lottery at all or to a lottery not then in progress. If he does so, he is entitled to an acquittal. If he does not do so or if he cannot do so he must be convicted. That does not mean to say of course that the presumption cannot be rebutted merely from the prosecution evidence. It can. But in this particular case reliance by the defence was placed on the date April 23, 1967 on the record of stakes but this date does not, in my view, in the absence of any evidence from one side or the other, establish as a fact that that record of stakes relates to that date specifically. Evidence must be called and such evidence must come from the defence having regard to the presumption and section 106 of the Evidence Ordinance.

The appeal is therefore allowed, the acquittal is set aside and the case is remitted to the magistrate for him to call upon the defence. The respondent is allowed bail in the sum of $1,000 in one surety.

Appeal allowed. Acquittal set aside. Case remitted to magistrate to call upon the defence.

SIVASUPRAMANIAM v. PUBLIC PROSECUTOR

[A.Cr.J. (Gill J.) October 5, 1967]

[K.L. — Criminal Appeal No. 54 of 1967]

Local Authority — Commencing building operations without prior authority — Whether owner of building liable — Municipal Ordinance (S.S. Cap. 133), s. 144(12) — Construction of.

In this case the appellant who was not the owner of the land commenced building operations involving the erection of a building without the prior approval of the appropriate authority in contravention of subsection (7) and punishable under subsection (10)(a) of section 144 of the Municipal Ordinance. He was charged in the magistrate's court and convicted on the overwhelming evidence of witnesses who saw him putting up the extension in respect of which the charge was made. This evidence was not rebutted. The main ground of appeal turned on the construction of subsection (12) of section 144 which by a statutory fiction deems the owner to have commenced or carried out the building operation.

Held: the reading of section 144 as a whole makes it clear that the legislature intended to saddle the owner of the land with the sole responsibility of seeing that section 144 was complied with. It is extremely unfair to saddle owners of land with this responsibility, especially when it is a common occurrence in most of the big Municipal areas and some of the Town Board areas for people to put up unauthorized buildings on lands not belonging to them and to squat on them, but